INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	4

CITATIONS

Cases:	
Bartlett v. *Kane*, 16 How. 263	9
Coffey v. *United States*, 116 U. S. 427	5, 7
Dorsheimer v. *United States*, 7 Wall. 166	8
Hanoy v. *Commissioner*, 67 F. (2d) 125	6
Lewis v. *Frick*, 233 U. S. 291	10
Lipke v. *Lederer*, 259 U. S. 557	7
McDowell v. *Heiner*, 15 F. (2d) 1015, affirming 9 F. (2d) 120, certiorari denied, 273 U. S. 759	7, 8
Murphy v. *United States*, 272 U. S. 630	10, 11
Passavant v. *United States*, 148 U. S. 214	9
Regal Drug Corporation v. *Wardell*, 260 U. S. 386	7
United States v. *La Franca*, 282 U. S. 568	5, 7, 9
Statutes:	
Act of 1864, c. 173, 13 Stat. 223:	
Sec. 14	5
Sec. 15	5
Revenue Act of 1913, c. 16, 38 Stat. 114:	
Sec. II F	6
Sec. II G	6
Sec. II I	5
Revenue Act of 1916, c. 463, 39 Stat. 756:	
Sec. 16 (U. S. C., title 18, sec. 216)	5
Sec. 18	6
Revenue Act of 1917, c. 63, 40 Stat. 300:	
Sec. 1209	6
Revenue Act of 1918, c. 18, 40 Stat. 1057:	
Sec. 250	5
Sec. 253	6
Revenue Act of 1921, c. 136, 42 Stat. 227:	
Sec. 250	5
Sec. 253	6

Statutes—Continued.

	Page
Revenue Act of 1924, c. 234, 43 Stat. 253:	
Sec. 275	5
Sec. 1017	6
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 275	5
Sec. 1114	6
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 146	6, 12
Sec. 293	5, 13
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 146	6
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 146 (U. S. C., Title 26, sec. 146)	6
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 146 (U. S. C., Supp. II, title 26, sec. 146)	6
Revised Statutes:	
Sec. 3176 (U. S. C., Title 26, secs. 1512, 1524)	5
Sec. 3179 (U. S. C., Title 26, sec. 1516)	6
Miscellaneous:	
Treasury Regulations 74, promulgated under the Revenue Act of 1928, art. 791	13

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES E. MITCHELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above cause on May 17, 1937, reversing in part the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 156–210) is reported in 32 B. T. A. 1093. The opinion of the Circuit Court of Appeals (R. 819–828) is reported in 89 F. (2d) 873.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 17, 1937. (R. 828–829.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer was indicted under Section 146 (b) of the Revenue Act of 1928 for a willful attempt to evade and defeat taxation. Does his acquittal bar the Commissioner from asserting, under Section 293 (b) of the Revenue Act of 1928, a 50% addition to the tax deficiency by reason of "fraud with intent to evade tax"?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 12–13.

STATEMENT

In his income tax return for the year 1929 the respondent claimed, and deducted from gross income, an alleged loss of $2,872,305.50 from a purported sale of 18,300 shares of National City Bank stock to his wife. (R. 96–97.) The respondent also failed to return as income an item of $666,666.67, received by him on July 1, 1929, as a distribution from the management fund of the National City Company, of which he was chairman. (R. 96.)

On April 25, 1933, an indictment was returned against the respondent by a grand jury of the District Court of the United States for the Southern District of New York. The indictment contained two counts. Only the first count is here material. That count charged that the respondent "unlawfully, willfully, knowingly, feloniously and fraudulently did attempt to defeat and evade an income tax of, to-wit, $728,709.84 upon his net income for 1929." (R. 154–155.) Thereafter the respondent was tried upon the charges contained in the indictment before the court and a jury. The trial commenced on May 11, 1933, and terminated on June 22, 1933, when the jury returned a verdict of not guilty on all counts. (R. 156.)

On December 8, 1933, the Commissioner asserted a deficiency against the respondent (R. 29) for the year 1929 in the amount of $728,709.84, together with a 50% addition thereto by reason of fraud in the amount of $364,354.92 (R. 30). This deficiency was arrived at by disallowing the deduction of the claimed loss on the purported sale of the 18,300 shares of National City Bank stock and the inclusion in gross income of the $666,666.67 distribution from the management fund received by the respondent on July 1, 1929. (R. 31.) The item of $728,709.84, set out in the first count of the indictment is identical with the deficiency, except that the 50% addition to the deficiency by reason of fraud was not involved in the indictment. (R. 155.)

The item of the indictment and the deficiency arose from the same transactions of the respondent. (R. 155.)

On the basis of the deficiency letter the respondent appealed to the Board. (R. 6–28.) The Board held that the deficiency was due, either in whole or in part, to fraud with intent to evade tax; and that the prior acquittal in the criminal proceeding did not afford a basis for either the defense of *res judicata* or double jeopardy. (R. 156–173.) The result was that the deficiency for the year 1929 was sustained. (R. 210–211.) The respondent petitioned for review. (R. 211.) The Circuit Court of Appeals for the Second Circuit upheld the deficiency but held that the 50% addition thereto was barred by reason of the prior acquittal in the criminal proceeding. (R. 828.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the respondent's acquittal in the prior criminal proceeding under Section 146 (b) of the Revenue Act of 1928 constituted a bar to the 50 per centum addition to the deficiency by reason of fraud under Section 293 (b) of the Revenue Act of 1928.

2. In holding and treating Section 293 (b) of the Revenue Act of 1928 as criminal in nature.

3. In not affirming the decision of the Board of Tax Appeals *in toto*.

REASONS FOR GRANTING THE WRIT

1. The decision below vitally and adversely affects the revenue and is therefore one of great pub-

lic interest and importance. Under the ruling of the Circuit Court of Appeals, which the court thought required by *Coffey* v. *United States*, 116 U. S. 427, and *United States* v. *La Franca*, 282 U. S. 568, the provisions of Section 293 (b) of the Revenue Act of 1928 are treated as added punishment for the offense defined in Section 146 (b) of the same Act. Section 293 (b) had its inception in Section 14 of the Act of 1864 (c. 173, 13 Stat. 223, 226–227). With slight changes Section 14 is now embodied in Section 3176 of the Revised Statutes. Section 3176 was made expressly applicable to the income tax by Section II I of the Revenue Act of 1913 (c. 16, 38 Stat. 114, 179) and was so continued by Section 16 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 775). In the Revenue Act of 1918, Section 250 (b) (c. 18, 40 Stat. 1057, 1083), a separate provision in lieu of, but similar to, Section 3176 of the Revised Statutes was adopted. With minor changes this part of Section 250 (b) has been continued in Section 250 (b) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 264), Section 275 (b) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253, 298) and 1926 (c. 27, 44 Stat. 9, 57) and as Section 293 (b) of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 858), and subsequent Acts. The Congress has always treated this provision as providing an addition to the tax and as being distinct and apart from the criminal penalties. The criminal provisions stem from Section 15 of the Act of 1864 (c. 173, 13 Stat. 223, 227).

Section 15 appears as Section 3179 of the Revised Statutes. The criminal provisions under the income tax laws are to be found in Section II F and G (d) of the Revenue Act of 1913, Section 18 of the Revenue Act of 1916, Section 1209 of the Revenue Act of 1917, Section 253 of the Revenue Acts of 1918 and 1921, Section 1017 of the Revenue Act of 1924, Section 1114 of the Revenue Act of 1926, and Section 146 of the Revenue Acts of 1928, 1932, 1934 and 1936.

The effect of the decision below is to consolidate the civil and criminal provisions and treat the civil provision as fixing an added or additional punishment for the criminal offenses defined by Section 146 (b). This was the construction placed upon Sections 250 and 253 of the Revenue Act of 1921 in *Hanby* v. *Commissioner* 67 F. (2d) 125 (C. C. A. 4th). Under this holding it may possibly be contended that the 50 per centum addition to the tax can only be imposed in the event of a conviction under Section 146 (b), on the ground that a person cannot be punished for the commission of a crime whereof he has not been indicted, tried and convicted. On the same theory the jurisdiction of the Board of Tax Appeals to consider an addition to a deficiency under Section 293 (b) may be questioned and contested by counsel for taxpayers. Hence, the administrative practice of more than half a century is threatened with overturn and a provision which has always been considered by the

administrative officers of the Government to be purely civil in nature must, under this decision, be treated as criminal in nature. Thus the Government is left without any civil safeguard to protect its revenues against fraud or to compensate it for the added effort and expense of investigating and discovering fraud. Indeed, under the *La Franca* case, where it was stated that a statute authorizing the collection of a criminal penalty by a suit civil in form following a criminal conviction would raise grave constitutional doubts, there is doubt as to whether the decision below leaves any field for the valid operation of Section 293 (b). See also *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386. This result, we submit, not only overturns the long settled administrative practice, but violates the Congressional intent and removes a necessary safeguard for the protection of the revenue. If the decision of this Court in *Coffey* v. *United States*, *supra*, compels this result (and we do not believe that it does), we respectfully request the Court to reexamine and overrule that case.

2. We submit that the decision in the instant case is in direct conflict with *McDowell* v. *Heiner*, 15 F. (2d) 1015 (C. C. A. 3d), [adopting the opinion of the District Court, 9 F. (2d) 120 (W. D. Pa.)], certiorari denied, 273 U. S. 759. In that case the Commissioner asserted deficiencies for the years 1913 to 1919, inclusive, together with 100% addi-

tions thereto for the years 1913 to 1917, inclusive, by reason of fraud under Section 3176 of the Revised Statutes, as amended, and 50% additions thereto for the years 1918 and 1919, by reason of fraud under Section 250 (b) of the Revenue Act of 1918. The taxpayer brought suit against the Collector to enjoin him from collecting the 100% and 50% additions to the tax. The taxpayer urged that the additions were not true taxes but constituted punishment for crime whereof he had not been tried and convicted, and that Section 3224 of the Revised Statutes was not applicable. The court overruled these contentions and dismissed the bill, clearly holding that the statutes there involved were not punitive in nature or purpose. No material distinction exists between Section 3176 of the Revised Statutes and Section 250 (b) of the Revenue Act of 1918, involved in *McDowell* v. *Heiner, supra,* and Section 293 (b) involved in the instant case. In this case the court below has treated Section 293 (b) as punitive in nature, and that treatment is the necessary basis of the decision. (See R. 827.)

This result is not only contrary to *McDowell* v. *Heiner, supra,* but conflicts in principle with the rule announced in *Dorsheimer* v. *United States,* 7 Wall. 166, 173, that penalties inflicted upon persons who attempt to defraud the revenue have as their purpose the enforcement of the collection of duties and taxes. A like conflict in principle exists be-

tween the decision below and *Passavant* v. *United States,* 148 U. S. 214, and *Bartlett* v. *Kane,* 16 How. 263, where this Court pointed out that additional customs duties of 20 per cent, imposed under the tariff acts when the value of imported goods exceeds the declared value by more than 10 per cent, were designed to discourage undervaluation of imported merchandise, to prevent efforts to escape the legal rate of duty, and to discourage fraud. Fundamentally, there is no distinction between the addition to the tax under Section 293 (b) of the Revenue Act of 1928 and the additional duties imposed by the tariff acts and involved in the *Passavant* and *Bartlett* cases. One is to prevent the understatement of income and the others are to prevent the undervaluation of imported merchandise. The additions to the tax imposed by Section 293 (b) are clearly an exercise of the taxing power and a necessary civil safeguard to prevent understatement of income. In this respect they are quite different from the exaction involved in the *La Franca* case.

3. An acquittal in a criminal proceeding does not afford a basis for a plea or defense of *res judicata* or double jeopardy in a subsequent civil proceeding, because of the fundamental differences in the nature of the two proceedings. The opinion below is not wholly clear as to whether the decision is based upon the doctrine of *res judicata* or upon double jeopardy. If based upon *res judicata,* as

seems more probably to be the case, it conflicts with the decisions of this Court in *Lewis* v. *Frick*, 233 U. S. 291, and *Murphy* v. *United States*, 272 U. S. 630. In *Lewis* v. *Frick*, an alien was ordered deported on the ground that he had brought a woman into this country for immoral purposes. He filed a petition for a writ of habeas corpus on the ground that the issue in the deportation proceeding was *res judicata* by reason of his acquittal of the same charge in a prior criminal proceeding. The writ was denied. This Court pointed out (at p. 302) that "the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." In *Murphy* v. *United States, supra,* the defendants were acquitted of the criminal charge of maintaining a nuisance in violation of the National Prohibition Law. Subsequently, an action was brought in equity under the provisions of another section of the same law to abate the same nuisance. The defendants plead their former acquittal and contended that the statute under which the equity suit was maintained imposed an additional penalty and that, having been acquitted of the crime, they could not be punished for it in a second proceeding. This Court held that the judgment of acquittal did not make the issues in the subsequent civil case *res judicata,* and that the second proceeding did not

have as its objective punishment of the defendants for the crime of which they had been acquitted. Hence, the decision below conflicts in principle with the *Murphy* case regardless of whether it is based on *res judicata* or on double jeopardy.

Wherefore it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

AUGUST 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 835, 858:

SEC. 146. PENALTIES.

(a) Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this section includes an officer or employee of a

corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable.

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 791. *Penalties.*—The penalties provided for in section 146 can not be assessed but are enforceable only by suit or prosecution. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1937